
In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Francisco Building Corp., Ltd., a corporation,

Appellant,

vs.

Leigh M. Battson, as Trustee, and H. H. Cotton, Charles C. Irwin, John Treanor, and J. B. Van Nuys, as the Medical Center Building First Mortgage Bondholders' Protective Committee,

Appellees.

APPELLANT'S MEMORANDUM OF POINTS
AND AUTHORITIES IN OPPOSITION TO
APPELLEES' MOTION TO DISMISS AP-
PEAL.

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No. 7961.

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I.

The Question Presented Upon This Appeal Is Not Moot for the Following Reasons:

A. THE COURT, BY ITS ORDER MADE JULY 29, 1935, [TRANSCRIPT, PAGE 94], RESERVED JURISDICTION OF THE SUBJECT MATTER INVOLVED UNDER APPELLANT'S PROPOSED PLAN OF REORGANIZATION.

(1) The order from which the appeal is taken is composed of three (3) formal parts; one of which rejected

the proposed plan of reorganization; the second vacated and set aside the order restraining sale by the trust indenture; and third, that the Court reserve jurisdiction to itself to make such further order or orders, not inconsistent with the first and second portions thereof hereinabove mentioned, as to the "Court may seem proper in exercising the powers conferred by the provisions of Sec. 77B of the Bankruptcy Act of 1898 as Amended."

It is apparent from the provisions of the foregoing order that any attempt on the part of appellant to move the Court for a further order restraining the sale under the trust indenture would have been contrary to the terms thereof where the Court stated it reserved jurisdiction to make such other order or orders not inconsistent with its order of said date. Any attempt to move the Court for such restraining order pending appeal would, therefore, be in violation of the expressed terms of the order made July 29, 1935, and might be considered as contemptuous. At the very least, it would have been an idle, futile or useless act. It is the law in the State of California that the law neither does nor requires an idle or useless act.

Civil Code—State of Calif., Sec. 3532.

(2) Unless it be the law that until the proceedings instituted under the provisions of Sec. 77B have been finally terminated that the Court retains jurisdiction over the subject matter therein involved, the very intent and purpose of said section will be defeated and this Honorable Court deprived of its appellate and advisory powers as set forth in sections 24 and 25 of the Acts of Bankruptcy as Amended.

(3) If it can be said that property, which is the very subject matter of the proceedings instituted under the provisions of the Acts of Bankruptcy, can be sold, conveyed, foreclosed or otherwise disposed of, without an order of Court allowing or permitting the same, then the very purpose of Sec. 77B may be summarily defeated by recalcitrant creditors.

B. IT IS THE LAW OF THE STATE OF CALIFORNIA THAT A TRUSTEE IS THE AGENT OF THE TRUSTOR AND ITS SUCCESSORS UNDER THE TRUST DEED—IN THIS CASE APPELLANT, AS WELL AS THE AGENT OF THE BENEFICIARY—IN THIS CASE THE BOND HOLDERS.

Ainsa v. Mercantile Trust Co., 174 Cal. 504 at 510;

Hartger v. Rickerhauser, 94 Cal. App. 755 at 761.

(1) Such a trustee must at all times act impartially in the interests of the trustor as well as the beneficiary.

Ainsa v. Mercantile Trust Co., 174 Cal. 504;

Hartger v. Rickerhauser, 94 Cal. App. 755.

Inasmuch as it is the settled law of the State of California that a trustee is the agent for the trustor, then it cannot be denied that the elementary principle that property in the hands of an agent is constructively in the hands of his principal, is applicable.

Under the foregoing authorities, although the trustee, Leigh M. Battson, was in actual possession of the property, nevertheless at the time of the filing of the petition herein, the property, not having been foreclosed, is constructively in the possession of his principal, to-wit, appellant.

(2) Under the decisions of the State of California, a trust deed carries no other incident of ownership of the property other than the power to convey upon default on the part of the debtor in payment of his debt.

Hollywood Lumber Co. v. Love, 155 Cal. 270;

McLeod v. Moran, 153 Cal. 97 at 99;

Sacramento Bank v. Alcorn, 121 Cal. 379.

The mere fact that the trustee under the trust deed, Leigh M. Battson, may have been in possession of encumbered property, will not change the rule, for even though he takes possession of such property, he takes the same as an agent of the trustor.

C. THE REAL PROPERTY OWNED BY APPELLANT HEREIN AND SUBJECT TO THE LIEN OF A TRUST DEED SECURING THE ISSUES OF BONDS IN QUESTION, THE TRUSTEE OF THE SAID TRUST DEED, NAMELY, LEIGH M. BATTSON, AND THE BONDHOLDERS' PROTECTIVE COMMITTEE (APPELLEES HEREIN) WERE EACH AND ALL UNDER THE JURISDICTION OF THE BANKRUPTCY COURT.

(1) The trustee in possession being the agent of the trustor until final foreclosure, the property owned by appellant is constructively in its possession.

(2) The purported statutory method of foreclosure set forth in the affidavit of Leigh M. Battson shows that foreclosure proceedings were not instituted until July 31, 1935. (Subsequent to the date of the filing of the petition for reorganization).

(3) The sale of the property in question, according to the affidavit of Leigh M. Battson was had October 31,

1935 (subsequent to the date of the filing of the petition herein).

(4) Under the order of Court made July 29, 1935, the District Court still retains jurisdiction over the subject matter of this action.

(5) The filing of the petition by appellant operates as a universal *caveat* and brings into the *custodia legis* of the Bankruptcy Court all properties of appellant where-soever situated.

Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 301, 56 L. Ed. 308;

In re Jersey Island Packing Co. (C. C. A. 9th, 1905), 138 Fed. 625.

(6) Deeds of Trusts executed by the appellant are not absolute conveyances under the decisions of the State of California herein cited. The grantor would have retained an interest in the property conveyed which is subject to administration in the bankrupt estate. The filing of a petition pursuant to the Acts of Bankruptcy as Amended is in substance and effect an attachment and an injunction and it places the property of the bankrupt, even though subject to a trust deed, constructively in the custody of the Court of Bankruptcy.

In re Jersey Island Packing Co. (C. C. A. 9th, 1905), 138 Fed. 625 at 627.

And see cases there cited.

The foregoing is a necessary conclusion which is derived from the general rule that the Court first obtaining jurisdiction over the *res* retains and obtains such juris-

diction to the final end and termination of the proceedings.

Murphy v. Hoffman, 211 U. S. 562;

Herkin v. Brundage, 276 U. S. 36;

In re Schulte-United Inc. (D. C. N. Y., 1930), 50 Fed. (2d) 243.

(7) The jurisdiction and control of a bankruptcy court of appellant's property vests as of the date of the filing of the petition pursuant to the Acts of Bankruptcy, subject to valid liens thereon. (Date of filing petition herein, April 19, 1935.)

In re Menzies (D. C. Ariz., 1932), 60 Fed. (2d), 1064);

Bankruptcy Act, Sec. 2 (7), 11 U. S. C. A., Sec. 11 (7);

Merchants etc. Bank v. Sewell (C. C. A. 5th, 1932), 61 Fed. (2d), 814 at 816.

Where a petitioner files a petition under the provisions of the Bankruptcy Act, as Amended, prior to any foreclosure suit or proceedings on its property which may be subject to valid liens, the jurisdiction of the Bankruptcy Court is exclusive irrespective of where the property is situated or by whom held.

Isaacs v. Hobbs Tie & Lumber Co., 282 U. S. 734, 75 L. Ed. 645;

Straton v. New, 283 U. S. 318-321;

In re Olivit Bros., Inc. (D. C. N. Y., 1932), 57 Fed. (2d) 718.

Leave may be given by the Bankruptcy Court to the mortgagee to institute foreclosure proceedings.

In re Schulte-United, Inc., (C. C. A.), 49 Fed. (2d) 264.

Where a court has acquired jurisdiction over the property of a person availing himself of the Acts of Bankruptcy as Amended, a mortgagee of the petitioner cannot foreclose a mortgage without the consent of the Court having jurisdiction over the proceedings.

Isaacs v. Hobbs Tie & Lumber Co., 282 U. S. 734, 75 L. Ed. 645;

In re Wakey (C. C. A. 7th, 1931), 50 Fed. (2d) 869.

The jurisdiction which the Bankruptcy Court has over the real property involved cannot be interfered with by foreclosure proceedings instituted after the filing of the petition; this being merely an application of the general principle that the jurisdiction of the Court which first takes possession of the property will be preserved whether that Court be a United States Court or a State Court.

Murphy v. Hoffman, 211 U. S. 562;

Herkin v. Brundage, 276 U. S. 36;

In re Schulte-United etc., Inc. (D. C. N. Y., 1930), 50 Fed. (2d) 243.

Appellees, by their petition [Tr. p. 51] submitted to the exclusive jurisdiction of the Bankruptcy Court. Where a person having a lien petitions as appellees did, that a restraining order enjoining them from foreclosing upon the property subject to a lien, be set aside and that their purported rights thereby be enforced, this act constitutes

a consent on the part of such persons and confers exclusive jurisdiction on the Bankruptcy Court.

Lung v. Pacific Storage Co., 123 Wash. 628, 212 Pac. 1081.

By reason of the foregoing authorities, the property as well as appellees were within the jurisdiction of the Bankruptcy Court and the said Court retained its jurisdiction over the property in question until the final termination of the proceedings herein.

D. THE SALE WAS NOT MADE WITH THE CONSENT OF OR APPROVED BY THE DISTRICT COURT.

(1) Neither the order made April 30, 1935 [Tr. p. 17], or the order made July 29, 1935 [Tr. p. 94] authorized, empowered or permitted the trustee, Leigh M. Battson, to foreclose and sell the property covered by the trust deed and then under the jurisdiction of the Court.

E. IN ORDINARY BANKRUPTCIES, IRRESPECTIVE OF WHETHER THE LIEN HOLDER IS IN POSSESSION OF THE REAL PROPERTY AT THE TIME OF THE FILING OF THE PETITION, A FORECLOSURE SALE OF REAL PROPERTY BY THE LIEN HOLDER IS VOID AND INVALID IF MADE WITHOUT THE CONSENT OF THE BANKRUPTCY COURT.

(1) The fact that the bankrupt's property may, at the time of the filing of the petition, be in the possession of the trustee for the benefit of creditors, creates a situation no different than if the bankrupt's property were in the possession of a receiver appointed at the instance of creditors.

(2) The possession of a bankrupt's property by a receiver appointed by a State Court prior to the filing of a petition in bankruptcy does not deprive the Bankruptcy Court of the right to the possession and control of the property.

Pugh v. Loisel (C. C. A. 5th, 1915), 219 Fed. 417.

(3) A creditor holding a lien or trust deed on real property under the jurisdiction of the Bankruptcy Court cannot acquire title to such property so as to become an adverse claimant and thereby exclude the jurisdiction of the Bankruptcy Court.

Cohen v. Nixon & Wright (D. C. 1916), 236 Fed. 407.

(4) The sale or foreclosure of a bankrupt's property which is subject to a deed of trust is a matter entirely within the discretion of the Bankruptcy Court.

Allebach v. Thomas (C. C. A. 4th, 1927), 16 Fed. (2d) 853.

(5) A summary sale of property subject to a trust deed held after the filing of a petition under the Courts of Bankruptcy without the consent of the Bankruptcy Court is void.

In re Hasie (D. C. Tex.), 206 Fed. 789;

Cohen v. Nixon & Wright (D. C. 1916), 236 Fed. 407.

(6) For the foreclosure of deeds of trust upon the property of the bankrupt is subject to the administration of the Bankruptcy Court.

In re Jersey Island Packing Co. (C. C. A. 9th, 1905), 138 Fed. 625.

(7) Requiring a trustee in a trust deed to petition a Court of Bankruptcy for leave to foreclose upon a property does not impair the obligations of a contract. The remedy of a trustee in foreclosing a deed of trust may be altered by a Bankruptcy Court without impairing the obligations of a contract so long as an equally adequate remedy could be afforded.

Allebach v. Thomas (C. C. A. 4th, 1927), 16 Fed. (2d) 853.

(8) Everyone who takes a mortgage or deed of trust takes it subject to the contingency that proceedings in bankruptcy against his mortgagor or trustor may deprive him of a specific remedy which is provided for in his contract.

In re Jersey Island Packing Co. (C. C. A. 9th), 138 Fed. 625 at 627.

Conclusion.

In conclusion respondent respectfully asserts that the question presented upon this appeal is *not* moot by reason of the following:

(a) The lower court reserved jurisdiction of the subject matter involved under appellant's proposed plan of reorganization, to-wit, the real property; (b) the trustee, appellee herein, Leigh M. Battson, was also the agent of the trustor and as such agent, the said real property was constructively in the possession of appellant; (c) the Bankruptcy Court had jurisdiction over the real property in question, as well as the trustee and beneficiaries of the trust deed; (d) the Bankruptcy Court having jurisdiction over the real property in question, it was incumbent upon

the trustee to request permission of the Court having such jurisdiction before foreclosing the property; (e) no such request was made to the Bankruptcy Court, nor did said Court consent, authorize or approve said sale; and (f) a summary foreclosure of real property by a lien holder is void and invalid if made without the consent of the Bankruptcy Court.

Appellant respectfully contends that by reason of the foregoing conclusions, supported by the authorities hereinbefore cited, the motion to dismiss this appeal upon the ground that the question involved is moot should be denied.

Respectfully submitted,

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